

Arsenoff



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Transcription Services, Inc.
File: B-240488
Date: November 28, 1990

Brian J. Vella, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for the protester.
Jeffrey K. Kominers, Esq., for Downtown Copy Center, an interested party.
Lawrence S. Schaffner, Esq., and Magalie R. Salas, Esq., Federal Communications Commission, for the agency.
Stefanie G. Weldon, Esq., Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that awardee's proposal for copying equipment and services violated statutory sanctions against contracting with the Toshiba Corporation is denied, because although the proposal did violate the sanction the violation did not result in any competitive disadvantage for the protester.

DECISION

International Transcription Services, Inc. (ITS) protests the award of a contract to Downtown Copy Center (DCC) under request for proposals (RFP) No. 90-03, issued by the Federal Communications Commission (FCC) to install and maintain duplicating equipment and services at its library and reference rooms to facilitate the copying of documents available to the public under the Freedom of Information Act (FOIA) and FCC regulations. The protester basically contends that the award violated Section 2443 of the Multilateral Export Control Enhancement Amendments Act,^{1/} which, as implemented, prohibits government agencies from contracting with and procuring products and services from the Toshiba Machine Company and the Toshiba Corporation. Further, ITS contends that it was also prejudiced by the FCC's post-award

^{1/} Pub. L. No. 100-418, § 2443, 102 Stat. 1107, 1365-66 (1988), 50 U.S.C.A. App. § 2410a (West Supp. 1989) ("the Act").

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decision to permit the awardee to substitute Konica copiers during contract performance for the Toshiba copiers it proposed to furnish in its offer and by what the protester views as a defective technical evaluation.

Although we find that the DCC proposal as accepted offered copiers which were prohibited, we deny the protest because the violation of the Act was corrected and the protester's competitive position was not prejudiced as a result of the violation or as the result of any other aspect of the procurement.

The solicitation contemplated a 1-year nonpersonal services contract with 2 option years to provide copies of agency documents through the use of self-service and/or contractor-operated copiers to be furnished and installed by the awardee at various FCC locations, with the contractor to be compensated exclusively through copying fees to be paid directly by the public. Award was to be made on the basis of both a technical score and a score based on the prices to be charged to the public for various copying services, with technical factors weighted at 60 percent in the final award analysis and prices weighted at 40 percent. Technical factors were scored on a 900-point scale with the installation of appropriate copying equipment accounting for a maximum of 50 points.

Offerors were required to identify the copiers they proposed to furnish and to submit descriptive technical literature concerning that equipment. The principal technical requirement relating to the copiers was that they be capable of duplicating 40 pages per minute. The RFP allowed the contractor to substitute copying equipment without agency approval at any time during contract performance.^{2/}

^{2/} As an amendment to the RFP containing FCC answers to the questions of prospective offerors clearly indicated, ITS itself, as the incumbent, had been permitted to substitute copying equipment without the necessity of a contract amendment.

The solicitation also included the following clause:^{3/}

"Section 2443 of the [Act] . . . imposes, for a period of 3 years, with certain exceptions, a prohibition on contracting with, or procuring (including rental and lease/purchase) directly or indirectly the products or services of . . . Toshiba Machine Company . . . [or] Toshiba Corporation"

Seven proposals were received from six offerors. (ITS submitted alternate proposals.) Following an initial evaluation, two offerors were eliminated from the competitive range and discussions were then conducted. A round of best and final offers (BAFOs) yielded the following results:

Offeror	Tech. Points	Price	Eval. Tech. Score	Eval. Price Score	Total Score
ITS	900	\$3,664,990	60.0	30.2	90.2
ITS (alt)	900	\$3,303,905	60.0	33.6	93.6
Off. A	900	\$3,530,333	60.0	31.4	91.4
Off. B	875	\$3,242,178	58.3	34.2	92.5
DCC	860	\$2,775,396	57.3	40.0	97.3

DCC was awarded a contract on July 6, 1990. On July 11, the contracting officer discovered that the awardee had proposed to install copiers manufactured by Toshiba at self-service locations; DCC was requested to substitute equipment that was not subject to the sanctions of the Act. By letter dated July 16, the awardee advised that it would substitute Konica equipment and submitted technical literature which the FCC reviewed.^{4/}

ITS' principal contention is that DCC's offer of Toshiba equipment constituted a violation of the Act and thereby rendered its proposal technically unacceptable. The protester also takes exception to the FCC decision to permit a post-award substitution of copiers--which ITS likens to improperly conducting discussions with only one offeror. Finally, throughout its various arguments ITS contends that it

^{3/} Federal Acquisition Regulation (FAR) § 52.225-13(b). Also see FAR Subpart 25.10--"Sanctions for Violation of Export Control."

^{4/} The record discloses that the Konica equipment is less expensive than the Toshiba equipment and is capable of producing at least 40 copies per minute as required.

was further prejudiced by a defective technical evaluation^{5/} which, in its view, did not properly downscore DCC for proposing unacceptable equipment.

Although the agency does not dispute the applicability of the Act to this procurement, DCC contends that the prohibition does not apply primarily because neither Toshiba products nor the services of that firm's employees are being procured by the government. For the reasons set forth below, we find that the Act was applicable to the RFP.

Section 2443 of the Act provides that the President shall impose a prohibition on contracting with, and the procurement of products and services from, Toshiba by any department, agency, or instrumentality of the government. As indicated earlier, the FAR clause implementing the statute and contained in the RFP provides that the prohibition extends to the indirect procurement of products and services from Toshiba, including rental and lease/purchase. FAR § 52.225-13(b); FAR § 25.1002(a).

Contrary to DCC's position, we do not believe that the rather unique character of this RFP--a service contract where the cost is borne by the public--excludes it from the prohibition of the Act. It is clear from the language of the sanctions as implemented that the intent of the prohibition is that Toshiba is not to be the recipient or beneficiary, directly or indirectly, of a government contract. We think this prohibition on indirect contracting is sufficiently broad so as to encompass more than just government purchases of Toshiba equipment or services. We think it also includes contractual situations such as this, where the government's prime contractor is required to provide duplicating equipment in a federal facility through which the government's obligation to the public under FOIA will be met. Thus, we think the

^{5/} The protester also questions whether the technical evaluation was rationally based since, in its view, that evaluation did not properly discriminate in terms of point scores between the protester's own alternate proposals (each received the maximum 900 points allowable), one of which met the RFP's minimum requirements and one of which offered "enhanced technical features." Since the RFP did not request enhancements it was reasonable for the FCC only to give evaluation credit for what it actually required and not to increase an offeror's technical score for proposing features which were not needed. Cf. Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114 (additional evaluation credit properly given where RFP requested proposals to "meet or exceed" stated technical requirements).

contracting officer properly was concerned about DCC's proposed use of Toshiba copiers.

As a result of the contracting officer's action and DCC's substitution of Konica copiers for the Toshiba equipment originally proposed, no machines manufactured by Toshiba will be used under the contract. Accordingly, since Toshiba neither receives a contract or otherwise benefits from performance of the DCC contract, there is no violation of the statutory prohibition.

ITS' position, however, is that because DCC initially offered to use Toshiba equipment its proposal was unacceptable and should not have been the basis for award. ITS is technically correct. Since we view the Toshiba proscription as applicable to this contract, the agency should not have accepted a proposal based on the use of Toshiba equipment. Instead, the agency should have dealt with this matter during competitive range discussions. Based on this record, we think it is obvious that had the agency pointed out to DCC its concern with the use of Toshiba copiers, DCC would have offered other, acceptable equipment in its best and final offer. Moreover, as discussed below, we think it is clear that DCC's revised offer would have remained the highest-scored proposal and therefore would have been selected for award. Accordingly, we think it is clear that ITS was not prejudiced by what happened here.

From the standpoint of the technical evaluation, the record shows that the awardee achieved no advantage over the protester because of its proposed use of the Toshiba machines. It is undisputed that there are a number of manufacturers who market copying machines which are capable of meeting the RFP requirements. In fact, and, contrary to the protester's suggestion that the agency did not properly evaluate DCC's substitute equipment, the technical literature concerning the replacement Konica copiers (which was reviewed by the FCC's technical evaluators) indicates that these machines meet the requirements. ITS also offered Panasonic copiers which were acceptable. Further, the copier equipment to be supplied constituted only a small part--50 points--of the 900 points which could be awarded in the overall technical evaluation. Based on the significant price differential--\$528,509--between ITS' and DCC's offers, the protester would not have received the award under the RFP evaluation scheme even if DCC were given no points under the technical subfactor which assessed the proposed copying equipment.


While the protester argues that the proposed copying equipment in fact impacts a number of RFP requirements which in its view directly affect evaluation factors totaling more than 250 points, the record shows that the agency allotted

50 points in its scheme for the equipment and conducted the evaluation on that basis. While it might have considered the equipment to be more important, it simply did not do so. DCC obtained no cost advantage by proposing Toshiba copiers as the substitute Konica equipment in fact cost less than the equipment originally offered.

In sum, while the DCC offer did run afoul of the Toshiba ban, we cannot conclude that this resulted in any competitive disadvantage for ITS in view of the widespread commercial availability of acceptable equipment, the lack of relative importance of the equipment in the RFP's evaluation scheme and the fact that DCC did not achieve a cost advantage because of its use of Toshiba equipment. While the protester argues that it was in fact prejudiced by the improper acceptance of the offer containing Toshiba equipment, we find nothing in the record which leads to this conclusion.

Furthermore, this situation is unlike that in our recent decision, Federal Data Corp., 69 Comp. Gen. 196 (1990), 90-1 CPD ¶ 104, where we sustained the protest because the agency in essence was conducting post-award discussions in an attempt to correct the awardee's non-compliant proposal without affording the protester an opportunity to revise its offer at the same time, and where it was not clear that the awardee could readily remedy the problem. Here, there is no question regarding the awardee's ability to offer acceptable substitute equipment, and the protester, having already received the maximum possible technical score and not suggesting that it would have significantly lowered its BAFO prices, provides no basis for us to conclude that the agency's failure to afford it the opportunity to submit another BAFO had any effect on its overall relative standing for award.

The protest is denied.


James F. Hinchman
General Counsel